UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 19

FRED MEYER STORES, INC.

and

Case 19-CA-31994

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1439 affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

MEMORANDUM IN SUPPORT OF MOTIONS TO TRANSFER CASE TO BOARD AND FOR SUMMARY JUDGMENT

Counsel for the General Counsel, pursuant to §§ 102.24, 102.26, and 102.50 of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 151 *et seq.*, files this brief in support of its Motions to Transfer Case to Board and for Summary Judgment ("Motion for Summary Judgment") against Fred Meyer Stores, Inc. ("Respondent"), based on the pleadings and related documents. In support of its Motion for Summary Judgment, Counsel for the General Counsel submits that the pleadings in Case 19-CA-31994 raise no material issues of fact or law that require a hearing before an administrative law judge, and states as follows:

I. Procedural History of the Case

The United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Union") filed the instant charge on July 6, 2009 (the "Charge"), alleging that Respondent violated §§ 8(a)(1) and (5) of the Act by failing and refusing to recognize the Union as the exclusive collective-

bargaining representative of certain disputed nutrition employees ("nutrition employees") employed at Respondent's Francis Ave., Spokane, Washington, retail store ("Francis Store").¹ (Exhibit A). The Regional Director of Region 19 of the Board ("Regional Director") issued a Complaint on July 27, 2009, based on the allegations in the Charge. (Exhibit B). Respondent filed an Answer and Affirmative Defenses ("Answer") to the Complaint on August 10, 2009. (Exhibit I).

II. Statement of Facts

Pursuant to a Petition filed in Case 19-RC-15068 on February 8, 2008 (Exhibit C), the Regional Director issued a Decision and Direction of Election on March 7, 2008 ("Decision") (Exhibit D), directing a self-determination election among the nutrition employees at the Francis Store to determine if they wished to be included in the existing Unit described in paragraph 6 of the Motion for Summary Judgment. On March 28, 2008, Respondent filed a Request for Review of the Decision. (Exhibit D-2).

On April 4, 2008, in accordance with the Decision, a secret ballot self-determination election was conducted under the direction and supervision of the Regional Director among Respondent's Francis Store nutrition employees, and the ballots were impounded.

On April 21, 2009, the Board issued an Order denying Respondent's Request for Review. (Exhibit E).

On May 7, 2009, in Case 19-RC-15068, the Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-

¹ All exhibits referred herein are attached to the accompanying Motion for Summary Judgment and are made a part thereof.

bargaining representative of the Francis Store nutrition employees as described in paragraphs 8-16 of the Motion for Summary Judgment. (Exhibit F).

On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Francis Store nutrition employees. (Exhibit G).

On or about June 26, 2009, Respondent, by admitted agent Carl Wojciechowski, informed the Union in writing that it would not bargain with it as the exclusive collective-bargaining representative of the Francis Store nutrition employees and, thereafter, has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. (Exhibit H).

III. The Pleadings Present No Disputed Material Issues of Fact or Law

- A. The Complaint alleges and the Answer admits the following:
- 1. The Charge was filed by the Union on July 6, 2009, and was served on Respondent by regular mail on or about July 7, 2009. (Exhibit B, paragraph 1).
- 2. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described in paragraph 2(a) of the Complaint with Ohio as the corrected State of Incorporation, derived gross revenues in excess of \$500,000. In its Answer Respondent corrected Counsel for the General Counsel as to the State of incorporation, and admits that it is a State of Ohio Corporation. (Exhibit B, paragraph 2(a)).
- 3. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described in paragraph 2(a) of the Complaint, as modified to reflect Ohio as the State of

incorporation, purchased and received at the Francis Store goods valued in excess of \$50,000 directly from points outside the State of Washington. (Exhibit B, paragraph 2(c)).

- 4. Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act. (Exhibit B, paragraph 2(d)).
- 5. The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act. (Exhibit B, paragraph 3).
- 6. At all material times, Carl Wojciechowski has held the position of Group Vice President, Human Resources, and is and has been an agent of Respondent within the meaning of § 2(13) of the Act, acting on behalf of Respondent. (Exhibit B, paragraph 4).
- 7. The following employees of Respondent (the "Unit"), constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(Exhibit B, paragraph 5(a)).

8. Since at least 1995, and at all material times, based on § 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit and, since then, has been recognized as such by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the

most recent of which was effective from January 2, 2005, to January 5, 2008, and extended by agreement of the parties. (Exhibit B, paragraph 5(b)).

- 9. On or about April 24, 2009, in Case 19-RC-15068, a majority of all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store, in a self-determination election, designated and selected the Union as their representative for the purposes of collective-bargaining with Respondent, to be included in the Unit ("Expanded Unit") (Exhibit B, paragraph 6(a)).
- 10. On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the nutrition department employees described in paragraphs 6 and 7 of the Complaint. (Exhibit B, paragraph 8).

B. The Complaint alleges and the Answer denies the following:

- 1. The Complaint alleges that on or about May 7, 2009, in Case 19-RC-15068, the Union was certified as the exclusive collective-bargaining representative of the Francis Store nutrition department employees. In its Answer, Respondent denies this allegation as it argues the Regional Director did not have the authority to certify the Union as the exclusive collective-bargaining representative of the Francis Store nutrition department employees. (Exhibit B, paragraph 6(b)).
- 2. The Complaint alleges that as a result of the certification described in paragraph 6(b) of the Complaint, the Union was certified as the exclusive collective-bargaining representative of the Expanded Unit, which includes all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave.,

Spokane, Washington, retail store. In its Answer, Respondent denies that the Union was properly certified. (Exhibit B, paragraph 6(c)).

3. The Complaint alleges that the following employees of Respondent, the Expanded Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

Respondent denies this allegation. (Exhibit B, paragraph 7(a)).

- 4. Respondent denies the allegation that, at all material times, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Expanded Unit, an appropriate unit of Respondent's employees. (Exhibit B, paragraph 7(b)).
- 5. The Complaint alleges that on or about June 26, 2009, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the bargaining representative of the nutrition department employees described in paragraphs 6 and 7 of the Complaint and thereafter has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. Respondent admits only that Wojciechowski informed the Union on about June 26, 2009, that it had no duty to bargain with the Union as the exclusive collective-bargaining representative of the nutrition employees. (Exhibit B, paragraph 9).

- 6. The Complaint alleges that by the conduct described in paragraph 9 of the Complaint, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its nutrition department employees described in paragraphs 6 and 7 of the Complaint in violation of §§ 8(a)(1) and (5) of the Act. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 10).
- 7. The Complaint alleges that the unfair labor practices of Respondent affect commerce within the meaning of §§ 2(6) and (7) of the Act. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 11).

IV. <u>Argument</u>

The Refusal to Recognize and Bargain with the Union Regarding Respondent's Francis Store Nutrition Employees Raises No Disputed Material Issues of Fact or Law

Respondent admits that, by letters dated May 28 and June 19, 2009, the Union asked it to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Francis Store nutrition employees. Respondent further admits that it sent a letter dated June 26, 2009, to the Union stating it "does not believe that it has a duty to bargain with [the Union] regarding the terms and conditions of employment of the nutrition employees working at [Respondent's] Francis Street store. Therefore, [Respondent] will not be participating in bargaining meetings on this subject." (Exhibit H). Thus, Respondent admits, and the evidence establishes, that it has refused to recognize and bargain with the Union with regard to its Francis Store nutrition employees.

Respondent denies, however, that the Union is the exclusive collectivebargaining representative of the nutrition employees, relying on Laurel Baye Healthcare of Lake Lanier v. NLRB, 564 F.3d 469 (2009), for the proposition that the Board did not have the authority to issue its April 21, 2009, Order denying Respondent's March 28, 2008, Request for Review. Further, Respondent contends that, because of this lack of authority, no obligation to bargain has attached regarding the nutrition employees because the Union's status as the exclusive collective-bargaining representative has not been determined. Respondent's argument is misguided.

The Board has addressed arguments regarding its statutory authority to issue Decisions and Orders, stating that:

Liebman. midnight December 28, 2007. Members Effective Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

Chenega Integrated Systems, 354 NLRB No. 56, fn 1 (July 29, 2009). Thus, the Regional Director's issuance of the Certification of Representative subsequent to the Board's Order denying Respondent's Request for Review established the Union as the exclusive collective-bargaining representative of Respondent's Francis Store nutrition employees. Accordingly, there are no material issues of disputed fact regarding the Union's status as the exclusive collective-bargaining representative of these employees

or of Respondent's obligation to recognize and bargain with the Union. *Concrete Form Walls, Inc.,* 347 NLRB 1299 (2006).

V. CONCLUSION

Counsel for the General Counsel respectfully submits that the evidence establishes that Respondent has violated §§ 8(a)(1) and (5) of the Act since about June 26, 2009, by failing and refusing to bargain with the exclusive collective-bargaining representative of its Francis Store nutrition employees. Accordingly, Counsel for the General Counsel requests that the Board grant the Motion for Summary Judgment and make findings of fact and conclusions of law that Respondent's conduct violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint. Counsel for General Counsel further requests that the Board issue the attached proposed Order and Notice to Employees and/or that the Board issue any other order and/or remedy deemed appropriate. (Exhibits J and K).

DATED at Seattle, Washington, this 17th day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2009, I caused copies of Motions to Transfer Case to Board and for Summary Judgment and Memorandum in Support of Motions to Transfer Case to Board and for Summary Judgment to be served upon each the following via E-File, E-Mail, and Federal Express:

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